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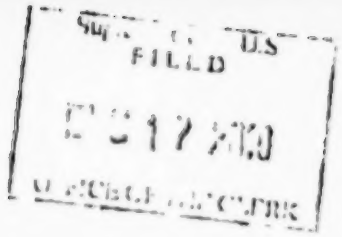

In The

Supreme Court of the United States

J. MCINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JONATHAN W. MILLER
Counsel of Record
GENE LOCKS
MICHAEL A. GALPERN
THOMAS L. GOWEN
LOCKS LAW FIRM
The Curtis Center
601 Walnut Street
Suite 720 East
Philadelphia, PA 19106
(215) 893-3405
jmiller@lockslaw.com

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, respectfully submits this brief as *amicus curiae* in support of Respondents, Robert Nicastro *et ux.* This brief is filed with the consent of all parties.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits and personal injury actions, including product liability cases. Plaintiffs represented by AAJ have a direct interest in holding accountable all entities that contributed to their injuries.

♦

SUMMARY OF ARGUMENT

This Court has recognized that evolving economic realities require an evolving jurisdictional analysis. Since the Court last engaged in an analysis of specific jurisdiction, the world's economy has become truly global, with the United States continuing to occupy center stage as a primary target market for the world's goods. Corporations, which did not fit comfortably into a traditional jurisdictional analysis

[1] Letters of consent from the parties have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members or its counsel make a monetary contribution to its preparation or submission.

before this transformation, now fit even less comfortably into traditional analysis in today's "flat" world.

Although this Court will eventually need to revise its analysis of specific jurisdiction in light of the realities of the modern world, it need not do so in this case, whose facts support a finding of jurisdiction in New Jersey under both the "stream of commerce" test set forth by Justice Brennan in his concurring opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 116 (1987), and the "stream of commerce – plus" test set forth by Justice O'Connor in the plurality opinion. *Id.* at 108.

If the Court does decide to address the broader question in the context of this case, however, it should conform jurisdictional analysis to today's economic realities in a test that remains true to Constitutional principles while being flexible enough to accommodate the myriad business transactions of the modern world. The Court should reaffirm the stream of commerce test for personal jurisdiction set forth in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), but should clarify that it is subject to the reasonable expectation of the manufacturer/distributor. Under this test, a manufacturer of a product is subject to personal jurisdiction in a State if it places the product in the stream of commerce with the reasonable expectation that the product will be marketed or sold in that State. If the manufacturer reasonably expects that the product will be marketed and sold nationwide, the manufacturer is presumed

to have intended to avail itself of the market in each State.

The test recognizes the reality of globalization, which has resulted in trillions of dollars of imports to this country. The test violates neither State territoriality nor State sovereignty. It relies on the foreseeability that is critical to Due Process. It requires an act by the defendant itself, not a third party. It applies equally to foreign and United States manufacturers. It satisfies the defense of ignorance of the forum. It interferes with neither foreign trade nor foreign relations.

Petitioner and its *amici* embrace the "stream of commerce – plus" test of Justice O'Connor in *Asahi*. They start with the fiction that purposefully directing products to all the United States does not include purposefully directing them to each State. On this fiction they construct a roadmap to immunity that could be called "don't ask, don't tell." A foreign manufacturer should employ a separate corporation to distribute its products in this country. The foreign manufacturer should neither ask the distributor where it intends to sell the products, nor should it tell the distributor where to sell them. Interpreting stream of commerce – plus strictly, the foreign manufacturer escapes all jurisdiction in this country at the same time that it reaps profits from this country. This can be done because a number of the factors considered in that test are no longer commercially meaningful for imports. The "remedy" provided to the injured plaintiff is to travel to the foreign manufacturer's

home country to sue, which, in the case of over forty percent of imports, is China.

♦

ARGUMENT

I. THE ECONOMIC REALITIES OF TODAY'S WORLD REQUIRE AN EVOLVING JURISDICTIONAL ANALYSIS.

A. This Court Has Signaled Its Recognition of the Need for Jurisdictional Analysis to Evolve as Business Becomes More International in Scope.

This Court has repeatedly recognized that jurisdictional analysis has evolved and should evolve as business becomes more complex and national in scope. This same recognition applies even more strongly now that business has become international in scope.

Over half a century ago, this Court stated that "[i]n a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222 (1957). The Court acknowledged that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *Id.* This trend is due in part to the "increasing nationalization of commerce. . . ." *Id.* at 223.

Twenty-three years later, the Court affirmed that the evolution it recognized in *McGee* was still very much at work:

> The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in *McGee v. International Life Ins. Co., supra,* at 222-223, this trend is largely attributable to a fundamental transformation in the American economy:
>
> "Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."
>
> The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-93 (1980).

McGee and *World-Wide Volkswagen* signal this Court's recognition that changes in commerce require changes in jurisdictional analysis.

B. We Live in a Truly Global Economy.

Petitioners' *amici* claim that foreign investment will dry up if Petitioner is held to account in a New Jersey state court. Petitioner's *amicis'* own sources refute the idea that finding jurisdiction in this case or any other will alter the desire of foreign manufacturers to do business here. The reason for this is that we live in a truly global economy where the United States is without question the world's largest consumer nation.

The Brief of the Organization for International Investment and Association of International Automobile Manufacturers Inc. as *Amici Curiae* in Support of Petitioner ("Organization for International Investment Brief") cites a number of non-legal sources to support its argument that United States legal uncertainty damages efforts to attract foreign direct investment. *See* Organization for International Investment Brief, pp. 9-12. Not one of these non-legal sources cites the stream of commerce test for personal jurisdiction, or even the more general question of the proper test for personal jurisdiction, as a concern of international investors about the predictability of the United States legal system. *See, e.g.,* Robert E. Litan, U.S. Chamber Inst. for Legal Reform, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* (Aug. 2007), *available at* http://www.instituteforlegalreform.com/component/ilr_docs/29/issue/LAI/STU.html ("Litan"), pp. 12-17 (listing the most worrisome aspects of the United States legal system); Charles G. Schott, U.S. Dep't of

Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* (Oct. 2008), *available at* http://www.investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf ("Schott"), pp. 5-8 (listing international investors' concerns with the United States legal environment).

One of these sources states that the United States economy "remains a prime destination for foreign direct investment," and predicts that "foreign investment likely will increase. . . ." James K. Jackson, Congressional Research Serv., *Foreign Direct Investment in the United States: An Economic Analysis* (July 28, 2010), *available at* http://www.fas.org/sgp/crs/misc/RS21857.pdf ("Jackson"), p. 6. The U.S. Chamber Institute for Legal Reform, which is part of the U.S. Chamber of Commerce, has questioned the "sky is falling" scenario that legal uncertainty deeply depresses foreign direct investment:

> Those companies having global ambitions and the financial strength to realize them are unlikely to avoid this country even if they believe our legal system to have drawbacks. The size and wealth of the American economy give it an enormous advantage relative to other countries and make us a "must" destination for investment by foreign parties with global ambitions. . . . For such countries [the United States and China], most foreign investors will tend to be forgiving of any warts because the profits from investing here

> are likely to more than cover the costs associated with the problems.

Litan, p. 23-24. *See also* Schott, pp. 10-11.

The stream of commerce – reasonable expectations test acknowledges the evolution of commerce often referred to as globalization. Globalization is the exponentially accelerating volume and speed of international exchange of information, goods and capital, bringing nations, markets, manufacturers, sellers and consumers closer together.

The U.S. Consumer Product Safety Commission Staff has referred to "an increasingly global economy." U.S. Consumer Product Safety Commission, Import Safety Strategy (July 2008), *available at* http://www.cpsc.gov/businfo/importsafety.pdf ("Import Safety Strategy"), p. 1. It has also referred to "the new global marketplace." *Id.* at 5. Michael O. Leavitt, then Secretary, Health and Human Services and Chair, Interagency Working Group on Import Safety, wrote President George W. Bush in July 2008 that "[l]ast year, the United States imported more than $2 trillion worth of products. These products were brought into the United States by roughly 825,000 importers through over 300 ports of entry. All projections indicate that this volume will continue to skyrocket over the coming years as the scale and complexity of international trade multiplies." Import Safety – Action Plan Update, A progress summary, A Report to the President, Interagency Working Group on Import Safety (July 2008), *available at* http://archive.hhs.

gov/importsafety/report/actionupdate/actionplanupdate.pdf ("Import Safety – Action Plan Update"), second page. The United Nations has referred to "the growing internationalization of production." United Nations Conference on Trade & Dev., *World Investment Report 2010* (June 2010), p. xvii.

Millions of units of toys, exercise equipment, pharmaceuticals, tires, cars, medical equipment, strollers, electronic equipment and other products manufactured abroad are brought into the United States and distributed through vast sales networks. Other larger ticket items such as industrial equipment are often sold through distributors or trade shows in the United States.

Petitioner's *amici* do not dispute globalization. *See, e.g.*, Brief of the Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Petitioner ("Product Liability Advisory Council Brief"), p. 31 ("the world is now 'flat' ") (citation omitted).

Globalization brings danger with it. "A wide range of products that could potentially threaten the health and safety of U.S. consumers are imported every day." Action Plan for Import Safety, A roadmap for continual improvement, A Report to the President, Interagency Working Group on Import Safety (Nov. 2007), *available at* http://archive.hhs.gov/importsafety/report/actionplan.pdf ("Action Plan"), p. 45. Imports are disproportionately recalled: "while imports currently account for about 44 percent of all consumer products sold in the United States today, they

comprise over three-fourths of all product recalls administered by the [Consumer Product Safety Commission]." Import Safety Strategy, p. 1. The ever increasing volume of potentially dangerous imported goods makes it vitally important to adopt a test for personal jurisdiction that recognizes the reality of globalization so that the tort system can fulfill its key role in enforcing expectations for product safety when products are manufactured abroad and imported to this country.

This Court has not yet addressed globalization in so many words, but as shown above, It has recognized the effect of changes in transportation and communication on State jurisdiction over nonresident corporations. As this Court said just twenty years ago,

> In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an "inevitable relaxation of the strict limits on state jurisdiction" over nonresident individuals and corporations.

Burnham v. Superior Court of California, 495 U.S. 604, 617 (1990) (Scalia, J.) (citation omitted).

The rapid expansion of the sale of foreign goods into the United States market should be met with a further evolution of the justice system to comport with the reality of modern commerce, and with a further inevitable relaxation of the strict limits on State jurisdiction.

II. IF THIS COURT DECIDES TO ESTABLISH THE CORRECT STREAM OF COMMERCE TEST, IT SHOULD REAFFIRM *WORLD-WIDE VOLKSWAGEN* BY ADOPTING A "STREAM OF COMMERCE – REASONABLE EXPECTATIONS" TEST.

This Court established a stream of commerce test for personal jurisdiction over corporations in *World-Wide Volkswagen, supra,* 444 U.S. at 297-98. Seventeen years later this Court split three ways over the correct interpretation and application of that test in *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987). Relevantly, a total of four Justices joined in Justice Brennan's stream of commerce test. *Id.* at 116. Four joined in Justice O'Connor's "stream of commerce – plus" test. *Id.* at 108.

The Court may use the instant appeal as a vehicle to address the stream of commerce test again. If it does so, the Court should remember that corporations "have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.'" *Burnham, supra,* 495 U.S. at 610 n.1 (Scalia, J.) (citation omitted). *Burnham* was decided in 1990, before the great expansion of the internet. *Burnham's* observation is all the more relevant today. Historical concepts such as territoriality have been rendered less relevant by globalization, particularly where corporations are involved.

A. The Court Need Not Choose the Correct Stream of Commerce Test in this Appeal.

The Court need not choose the stream of commerce test or the stream of commerce – plus test in this appeal. As has been argued at greater length in Brief for Respondents, the facts of this appeal satisfy both tests.

Among those facts are that J. McIntyre Machinery, Ltd. ("McIntyre England") expressly sought to sell its products "in the States. . . ." (J.A. 134a). It regularly marketed its products at trade shows, conventions and conferences throughout the United States over a fifteen year period, including trips to these events by its president. (J.A. 114a-117a). McIntyre England engaged a single, exclusive distributor to market its products throughout the United States. (App. 76a; J.A. 43a, 52a-53a). There is no suggestion that either McIntyre England or its United States distributor sought to limit sales to any region or State.

The facts of this case satisfy Justice O'Connor's stream of commerce – plus test. McIntyre England created and employed the system of distribution. *See Asahi, supra,* 480 U.S. at 112. The sale of the machine at issue here was "not simply an isolated occurrence, but [arose] from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States."

Id., 480 U.S. at 110 (quoting *World-Wide Volkswagen, supra,* 444 U.S. at 297).

The facts also satisfy Justice Brennan's stream of commerce test. *See Asahi, supra,* 480 U.S. at 117 ("As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise").

B. The "Stream of Commerce – Reasonable Expectations" Test is the Correct Test for Personal Jurisdiction Over Corporations.

If the Court decides to establish the correct stream of commerce test, this Court should adopt a "stream of commerce – reasonable expectations" test: a manufacturer of a product is subject to personal jurisdiction in a State if it places the product in the stream of commerce, reasonably expecting that the product will be sold anywhere in the United States, and the product causes injury in the State in which it is sold. If the manufacturer places the product in the stream of commerce in the United States without territorial restriction on the sale of the product, then the manufacturer is presumed to have reasonably expected that the product would be sold in any of the fifty States, and so the manufacturer is subject to personal jurisdiction in any State where the product causes injury.

The stream of commerce – reasonable expectations test satisfies the *Due Process Clause of the Fourteenth Amendment*. The test is a reaffirmation and clarification of the stream of commerce test set forth in *World-Wide Volkswagen* that adds the word "reasonable":

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," [citation omitted], it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

World-Wide Volkswagen, supra, 444 U.S. at 297-98 (citation omitted).

The adjective "reasonable" is a clearly implied limit on the above definition of the stream of commerce test, as shown by its use elsewhere in *World-Wide Volkswagen*. *E.g.*, *id.* at 297 ("it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there") (citation omitted). A reasonable expectation that a product will be purchased in the forum State is the same as saying that the forum State is part of the reasonable market for the product.

The stream of commerce – reasonable expectations test is a clarification of Justice Brennan's stream of commerce test in *Asahi*, where the reference to unpredictable currents and eddies is another way of saying that the stream must be reasonable:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale.

Asahi, supra, 480 U.S. at 117.

Under this test, jurisdiction is dependent on the reasonable market. If that market is fifty States, then jurisdiction can occur in any of the fifty States where the product comes to rest and causes injury. This is simply common sense. All must include each. This may be seen as a presumption: if the manufacturer places its product into the stream of commerce in the United Sates without restriction on where it can be sold, then the manufacturer should reasonably expect

that the product will be sold anywhere in the United States, and the manufacturer should be presumed to have intended to avail itself of the market in each State.

One of Petitioner's *amici* recognized that selling a product to a distributor for the entire United States meant that the product would be resold in a particular State: "Petitioner's sole act was selling a machine to a company in Ohio with the knowledge that it would, if resold, ultimately come to rest *somewhere* in the United States." Product Liability Advisory Council Brief, p. 22 (emphasis in original). It could more reasonably be stated that Petitioner, not having restricted the sales territory of its United States distributor, knew that since Ohio was only one of fifty States, there was a substantial certainty that the machine would be resold to a State outside of Ohio.

The same *amicus* approved a case finding jurisdiction in a State in a discrete, multi-State trade area served by a regional distributor. *See Id.* at 17. There should be no constitutional difference between use of a distributor for a group of some States and use of a distributor for a group of all States.

The stream of commerce – reasonable expectations test satisfies all traditional constitutional concerns. It satisfies the requirement of minimum contacts with the forum. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). Under this test, the defendant

manufactured the product and chose to place it in the stream of commerce in the United States without territorial restriction. Thus it should be held to have reasonably expected that it would be sold in the forum State. The product caused injury in the forum State, giving that State a "significant interest in redressing injuries that actually occur within the State." *Keeton v. Hustler Magazine,* 465 U.S. 770, 776 (1984). Finally, the litigation filed in the forum State arises out of the confluence of the presence of the product that was reasonably expected to be sold in that State, and the injury caused in that State by the product. Minimum contacts are satisfied.

Petitioner's *amici* note that the lower court here separated the stream of commerce test from minimum contacts. *See, e.g.,* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner ("Chamber of Commerce Brief"), p. 6. It has been argued persuasively that stream of commerce is not part of the minimum contacts doctrine. *See* Diane S. Kaplan, *Paddling up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine,* 55 Baylor L. Rev. 503 (2003). Whether this Court decides that stream of commerce is or is not part of minimum contacts, there is no question that stream of commerce is a constitutional test for personal jurisdiction over corporations. *See, e.g., World-Wide Volkswagen, supra,* 444 U.S. at 297-98.

Traditional notions of fair play and substantial justice, *Helicopteros, supra,* 466 U.S. at 414, are not

offended by the stream of commerce – reasonable expectations test.

Foreign manufacturers have claimed they have difficulty in defending themselves in the United States. That has certainly not been the case here, where the Petitioner appeared at dozens of trade conventions throughout the United States from 1990 to 2005, and where it has litigated this case tenaciously for over seven years. More generally, "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *World-Wide Volkswagen, supra,* 444 U.S. at 293 (quoting *McGee, supra,* 355 U.S. at 223). Defendants are readily able to obtain insurance for their products or retain counsel to represent them in the States where their products are sold and cause harm. To the extent that a foreign manufacturer wishes to profit from sales in the United States, the largest market in the world, it is hardly unfair to require that defendant to be accountable where it is making money.

The forum State clearly has an interest in redressing injuries that occur to its citizens in its State. *See Keeton, supra,* 465 U.S. at 776. Plaintiffs have an equally clear interest in obtaining relief for their injuries in their home States, where their injuries occurred, where their medical treatment likely occurred, and where liability witnesses likely live. The interstate judicial system's interest in the most efficient resolution of controversies is satisfied when

all potentially liable parties in the chain of distribution appear in one tribunal.

This is also fair to all defendants, who benefit when all potentially liable parties are in one tribunal. *See Newmark v. Gimbel's Inc.*, 54 N.J. 585, 601, 258 A.2d 697, 704 (1969) ("If the plaintiff sues the dealer alone, the dealer in his own interest should implead the manufacturer and thus avoid circuity of action"); *see also Patterson v. Home Depot, USA, Inc.*, 684 F. Supp. 2d 1170, 1174 (D. Ariz. 2010) (both plaintiff and defendant Home Depot, USA, Inc., opposed the motion to dismiss for lack of personal jurisdiction filed by a German defendant). Since manufacturers tend to be larger than distributors and many ultimate retail outlets, holding all potentially liable parties in the case benefits substantially small businesses, who are "a core component of the Chamber's [of Commerce] membership." Chamber of Commerce Brief, p. 25. This is an unusual case where plaintiffs and many domestic defendants would be equally served by leveling the playing field by permitting personal jurisdiction over foreign manufacturers of defective products.

The shared interest of the States in furthering substantive social policies is shown in this case and all others where a product causes injury by finding jurisdiction over manufacturers of products that fail to adhere to safety standards and the injured party is seeking redress. *Cf. Asahi, supra,* 480 U.S. at 114-15 (O'Connor, J.) ("[t]he dispute between Cheng Shin

and Asahi is primarily about indemnification rather than safety standards").

The stream of commerce – reasonable expectations test satisfies objections of Petitioner and its *amici*. One is the essential requirement that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Selling a product to another entity with the reasonable expectation that it will be resold in any of the States of the United States is just as much a purposeful act as shipping the product directly to customers in any of the States.

Another objection is that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen, supra*, 444 U.S. at 297 (citations omitted). If a product causes injury, its manufacturer should anticipate being haled into court. If the place of injury is among the States where the manufacturer reasonably expected that the product would be sold, then the manufacturer should reasonably anticipate being haled into court in that State.

Another objection by Petitioner's *amici* is lack of predictability. Predictability is satisfied by the stream of commerce – reasonable expectations test. A manufacturer can predict that it will be liable to suit only

in those jurisdictions where it reasonably expects that the stream of commerce will take its products.

Petitioner particularly advocates strict adherence to the concept of territoriality in interpreting the *Due Process Clause*. The test recognizes territoriality while relaxing the standard for finding it to comport with the free flow of commerce across State lines. The test allows a manufacturer prospectively to opt out of sales into a jurisdiction to whose legal system it objects. To the extent there is any conflict between the test and territoriality, "Due process does not necessarily require the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer* [*v. Neff*, 95 U.S. 714 (1878)]. . . ." *Burnham, supra*, 495 U.S. at 617 (Scalia, J.).

A similar objection is that stream of commerce effectively erases state lines, thereby "contravening the notion of states as independent sovereignties in our federalist system." Product Liability Advisory Council Brief, p. 9. The test does not destroy sovereignty and in fact recognizes the sovereign rights of the States to adjudicate claims arising within their borders and to provide judicial fora for their injured citizens.

Another objection is that basing jurisdiction on "should know" where a product ends up bases jurisdiction on foreseeability alone. Organization for International Investment Brief, p. 8. The stream of commerce – reasonable expectations test does not rest

on mere "should know" or foreseeability alone. It rests on the foreseeability that is critical to Due Process:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

World-Wide Volkswagen, supra, 444 U.S. at 297 (citations omitted).

A defendant should "reasonably anticipate" out-of-state, or now out-of-country, litigation where there is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King, supra,* 471 U.S. at 475 (quoting *Hanson, supra,* 357 U.S. at 253).

The act by the manufacturer that purposefully avails itself of the privilege of conducting activities within the forum State is knowingly placing its product in the stream of commerce intending that it be resold, and reasonably expecting that it would be resold in any of the States that comprise its market. One could hardly argue that a manufacturer that authorized its distributor to sell only in New Jersey did not purposefully avail itself of the New Jersey market. If the manufacturer authorized sales only in New York, New Jersey and Pennsylvania, it similarly purposefully availed itself of the market in those

three States. The same obtains for authorizing its distributor to sell in the entire United States market and therefore impliedly in any or all fifty States.

A related objection is that jurisdiction based on mere awareness depends on the actions of a third party, not the defendant itself. Product Liability Advisory Council Brief, p. 13. The error here is assuming that jurisdiction is based on mere awareness. The manufacturer is held to account when it reasonably expects that the product will come to rest in the forum State, and that occurs when the manufacturer itself authorizes sale to every State and thus to each State.

Amicus AAJ agrees that the same personal jurisdiction test that applies to finished-product manufacturers should apply to component-product manufacturers. Under the stream of commerce – reasonable expectations test, Dow Chemical Canada placed its products in the stream of commerce, reasonably expecting them to end up in the United States. *See* Brief of *Amicus Curiae* Dow Chemical Canada ULC in Support of Petitioner on the Merits ("Dow Chemical Canada Brief"), pp. 1-2.

Amicus AAJ agrees that the same personal jurisdiction test that applies to foreign manufacturers should also apply to United States manufacturers.

Petitioner is concerned about a person anywhere in the world whose products end up in New Jersey, "a place the person may never have heard of." Brief for Petitioner, p. 36. An individual manufacturing Thai

souvenirs in Thailand whose product is bought by an ultimate consumer visiting from New Jersey may truly never have heard of New Jersey. That Thai manufacturer will not be held to account in New Jersey, because he did not place his product into the stream of commerce, reasonably expecting that it would be sold in the United States. On the other hand, sophisticated manufacturers should be held to knowledge of the federated structure of the United States and should be charged with knowledge of the laws of the various States, just as United States manufacturers are charged.

A United Kingdom manufacturer who deliberately chooses not to know where its U.S. distributor sells its products will not escape jurisdiction by the ostrich defense, because the test is what a manufacturer would reasonably have expected, not what a manufacturer unreasonably and deceptively did. *See DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.) ("the fairness requirements of due process do not extend so far as to permit a manufacturer to insulate itself from the reach of the forum state's long-arm rule . . . by professing ignorance of the ultimate destination of its products"), *cert. den.*, 454 U.S. 1085 (1981).

Defendants complain about the expense and time of jurisdictional discovery. Chamber of Commerce Brief, pp. 16-17. The stream of commerce – reasonable expectations test, however, is a straightforward, simple test. Further, "[i]n the mine run of cases, jurisdiction 'will involve no arduous inquiry'. . . ."

Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 436 (2007) (citation omitted). If the inquiry does appear arduous, a defendant in federal court can always move to dismiss under *forum non conveniens* prior to jurisdictional discovery, *id.* at 425, and a defendant in state court can make the same motion. Any cost of discovery should be seen as a cost of doing business in the United States. *See* Litan, p. 24 ("most foreign investors will tend to be forgiving of any warts because the profits from investing here are likely to more than cover the costs associated with the problems").

Petitioner argues that certain States "pose a greater challenge, and thus a greater risk of loss," to manufacturers. Brief for Petitioner, pp. 19-20. It cites an article by the American Tort Reform Association titled "Judicial Hellholes, 2009." Brief for Petitioner, p. 20. The "Judicial Hellholes" are South Florida; West Virginia; Cook County, Illinois; Atlantic County, New Jersey; the New Mexico appellate courts; and New York City. The "Watch List" of Judicial Hellholes includes California and Alabama. American Tort Reform Association, "Judicial Hellholes, 2009," p. 1, *available at* www.atra.org/reports/hellholes/.

Petitioner and its *amici* have a remedy to escape Judicial Hellholes. As this Court has said, "if the risks are too great," a corporation can sever its connection with that State. *World-Wide Volkswagen,* 444 U.S. at 297. This gives manufacturers the opportunity to do prospective forum shopping.

Petitioner and its *amici* complain that this remedy is inadequate. It is "unworkable from a practical perspective" and "undesirable." Organization for International Investment Brief, p. 15. If a manufacturer wishes to sell to this country, and the manufacturer wishes to avoid sales to specific jurisdictions, all the manufacturer has to do is direct that its distributors and retailers not sell its product into the States where it does not wish to sell. That is hardly difficult.

Objection is raised that a trade barrier has been erected, Brief for Petitioner, p. 28, and even that the lower court has interfered with the conduct of this country's foreign relations. Organization for International Investment Brief, pp. 22-25. In addressing these arguments, it is useful to consider the position of the United States.

The United States filed Brief for the United States as *Amicus Curiae* Supporting Petitioners ("United States *Brown* Brief") in the companion case to this one, *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76. The United States argues in *Brown* that a broad assertion of general jurisdiction there would harm the United States' foreign trade and foreign affairs interests. United States *Brown* Brief, pp. 28-34. On the other hand, the United States found no such problem in cases like the present where personal jurisdiction was based on specific jurisdiction:

> With respect to certain questions of personal jurisdiction that are largely not

> presented here [in *Brown*], the interests of the United States are served by permitting suits against foreign entities to go forward in domestic courts. For example, United States residents benefit from the availability of convenient domestic fora to obtain redress for injuries caused by foreign entities. That interest, however, is often vindicated by *reasonable exercises of specific jurisdiction*, without resort to general jurisdiction.

United States *Brown* Brief, p. 28 (emphasis added).

One thing is certain. If this Court adopts the stream of commerce – reasonable expectations test, New Jersey has constitutional personal jurisdiction over the Petitioner, who placed its machine in the stream of commerce, reasonably expecting it to be sold anywhere in the United States.

C. Petitioner's and Its *Amicis'* Embrace of the "Stream of Commerce – Plus" Test Employs a Fiction to Create a Roadmap to Immunity.

The "stream of commerce – plus" test set forth by Justice O'Conner in *Asahi, see Asahi, supra,* 480 U.S. at 112, has been embraced expressly or effectively by Petitioner and its *amici.* This Court should not adopt the stream of commerce – plus test because it has been misused in order to avoid responsibility for defective foreign products and because it does not comport with the reality of modern commerce. Petitioner and its *amici* have started with a fiction and on

it constructed a roadmap to grant all foreign manufacturers absolute immunity from jurisdiction in U.S. States. This is a misuse of the stream of commerce – plus factors.

The fiction is that intending to sell products to any State in the United States does not manifest the purpose of selling products to any particular State. Petitioner and its *amici* would have this Court believe that even though they are willing to have products sold anywhere in the United States market, that somehow does not evidence an intention to avail themselves of the markets in New Jersey or California or New York or Michigan or any other particular State. A product cannot be sold in the United States without being sold in one or more of the fifty States.

The Product Liability Advisory Council argues that to establish jurisdiction, the defendant must have "purposefully directed its activities *to the forum state*, not merely to a geographical region that includes the forum state." *Id.*, p. 25 (emphasis in original). This means that unless the manufacturer explicitly stated that it wanted to sell in fifty named States, selling in the "geographical region" where those States are located is not enough. This is a breath-taking philosophical construct: floating somewhere over States are "geographical regions" that are not parts of States. Merely to state this proposition is to expose the incongruity between the global sales market which flows readily from country to country and State to State, and a justice system that remains

mired in outdated interpretations of the *Due Process Clause*.

Petitioner and its *amici* use the fiction that fifty does not include one to create a roadmap to immunity. The roadmap is simple: it can be called "don't ask, don't tell." A foreign manufacturer employs a separate corporation to distribute its products in the United States. The foreign manufacturer does not ask where in the United States the distributor plans to sell its products, nor does the foreign manufacturer tell the distributor where to sell its products in the United States. Then, based on a strict construction of the stream of commerce – plus test, the foreign manufacturer says it did not act purposefully toward any particular State, and so it escapes jurisdiction in every State.

Petitioner is open that that is its purpose. Petitioner says that "[a]ll are entitled to trade with the United States without being dragged into New Jersey courts in derogation of our Constitution and New Jersey's proper role in our federal system." Brief for Petitioner, pp. 18-19. Petitioner then refers to "the fear that a foreign producer of goods could be immune from suit in every state, even though the producer would be amenable to suit in another country." *Id.*, p. 37. That other country in the instant case is the United Kingdom. *See id.* Petitioner does not note that in 2007, approximately 42 percent of imported consumer products came from China. Import Safety Strategy, p. 3.

For an individual worker injured in New Jersey or any other State, the "remedy" of suit in the United Kingdom is just as illusory as the "remedy" of suit in China: he cannot afford either. This Court recognized over fifty years ago that "[w]hen [insurance] claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign [here meaning a distant State] forum – thus in effect making the company judgment proof." *McGee, supra,* 355 U.S. at 223. This is precisely what Petitioner desires here: immunity from any suit anywhere in the United States.

The U.S. Chamber Institute for Legal Reform has given foreign manufacturers explicit suggestions how to minimize their exposure to legal liability in the United States. *See* Litan, pp. 29-32. The Institute's parent organization, the Chamber of Commerce, leaves no doubt as to its purpose:

> Those limits may, of course, result in certain cases where a citizen of the forum state is injured in the forum state by an overseas manufacturer's product and yet not have an American forum in which to sue the manufacturer.

Chamber of Commerce Brief, p. 19.

The Chamber admits that it could be charged with creating a roadmap to immunity:

> While it may be objected that this distinction provides companies a roadmap for how to structure their operations in order to

> avoid judicial jurisdiction, that complaint is both inaccurate and ignores one of the central purposes of the Due Process constraints on state courts' exercise of judicial jurisdiction.

Id., p. 24.

According to the Chamber, the complaint is inaccurate because the plaintiff "may have remedies in other forums." *Id.* The Chamber does not admit, as Petitioner does, that those other fora are overseas. A central purpose of the *Due Process* constraint, according to the Chamber, is that potential defendants should have predictability about conduct that will subject them to jurisdiction, citing *World-Wide Volkswagen, supra,* 444 U.S. at 297. However, what *World-Wide Volkswagen* said was that the *Due Process Clause* "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to *where that conduct will and will not render them liable to suit.*" *Id.* (emphasis added). The Chamber and Petitioner would change the italicized words to "how their conduct can render them immune from suit anywhere in the United States." *World-Wide Volkswagen*, and we submit, the stream of commerce – plus test in *Asahi*, never intended to authorize a roadmap to render overseas manufacturers immune from suit in every State in this country.

One reason that manufacturers can misuse the stream of commerce – plus factors is that many of those factors are no longer commercially meaningful,

at least with regard to imports. *See Asahi, supra,* 480 U.S. at 112 (O'Connor, J.) (listing the plus factors). Almost nothing is designed for a particular State, other than souvenirs or sports apparel. Machines that chew metal are not designed for specific jurisdictions. Pharmaceuticals from Canada or the United Kingdom are not designed for particular States. Toys from China are not designed for particular States. Nor are most other products that could cause injury.

There is advertising directed to particular States, such as local automobile dealers or local food or clothing chains. However, a substantial percentage of ads are placed pursuant to national ad campaigns for products like foreign cars. These ads are placed on television, radio, newspapers, trade magazines and the internet[2] – all of which reach consumers in the States where they reside with the intent of encouraging the purchase of these products either through local retailers or by interstate shipment.

[2] One *amicus* requests that this Court rule that internet advertising is not directed to a particular State. Chamber of Commerce Brief, pp. 24-26. This question need not be reached if the Court adopts the stream of commerce – reasonable expectations test. Even if the Court adopts a stream of commerce – plus test, we suggest that it is premature to address internet advertising. There are variations in web sites, such as those that are interactive, and the issue has not been briefed thoroughly by the parties. Nevertheless, it should be noted that a manufacturer whose website is seen within a given State and who receives an order from that State can always decline the order if it objects to the legal system in that State.

Channels for providing regular advice to customers in the forum State are no longer particular to a State as opposed to directed to all States. The channel for advice today is likely to be a central call center in the United States or India.

"[M]arketing the product through a distributor who has agreed to serve as the sales agent *in* the forum State," *Asahi,* 480 U.S. at 112 (O'Connor, J.) (emphasis added), implies that the distributor will travel physically to the forum State. That is outdated. Distributors are often charged with selling a product in many or all of the fifty States. Commerce is often conducted from a central location by telephone, internet and overnight delivery, as well as sales through retailers. The sheer volume of the products imported through distributors or large retailers virtually assures that the intent is to sell the product throughout the fifty States.

Finally, the Chamber of Commerce suggests waiting for Congress to "fill the gap" through federal legislation. Chamber of Commerce Brief, p. 19. This suggestion is based on the neutral footnote on this subject in *Asahi, supra,* 480 U.S. at 113 n.* (O'Connor, J.). The Chamber of Commerce thus suggests that until and unless Congress passes a statute, foreign manufacturers should be free to sell to all fifty States without being held to account in any. The Chamber does not inform this Court that the present Bill in Congress focuses on service, and the reduction of the inefficiency of service in foreign jurisdictions, with only a secondary reference to

jurisdiction. The Chamber does not tell this Court that that Bill would require consent to jurisdiction in only one State, which could be nearly as illusory a remedy for citizens as jurisdiction in the United Kingdom or China.

The main reason why this Court should not wait for Congress is that jurisdiction in State courts comports with the *Due Process Clause*.

♦

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

JONATHAN W. MILLER
Counsel of Record
GENE LOCKS
MICHAEL A. GALPERN
THOMAS L. GOWEN
LOCKS LAW FIRM
The Curtis Center
601 Walnut Street
Suite 720 East
Philadelphia, PA 19106
(215) 893-3405
jmiller@lockslaw.com

Counsel for Amicus Curiae